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No. 73-663

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,
Plaintiffs-Respondents,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,
Defendants-Respondents,

WILLIAM R. WESSON,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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This brief is submitted by respondents, being all of the parties to the original action, in opposition to the petition for a writ of certiorari submitted by William R. Wesson, a member of the plaintiff class and objector to the settlement approved by the District Court and affirmed by the Court of Appeals.

Opinion Below

The opinion of the District Court for the Southern District of New York approving the settlement of this action is reproduced commencing at A 4 of the Petition, and is reported at 59 F.R.D. 353 (S.D.N.Y. 1973). The judgment of the Court of Appeals for the Second Circuit affirming the judgment of the District Court upon the opinion of the District Court is reproduced at A 2 of the Petition.

Questions Presented

1. In a class and derivative action, does the District Court have power under Fed. R. Civ. P. 23(e) and 23.1 to approve a settlement negotiated by the parties which not only resolves the issues in dispute but also the fundamental conflict between the parties which gave rise to the action?

2. In a suit primarily to compel the payment of dividends to a particular class of stockholders, are the holders of that class of stock an appropriate class under Fed. R. Civ. P. 23(a), (b)(1) and (2), all members of which will be bound by a judgment entered by the District Court pursuant to Fed. R. Civ. P. 23(e) dismissing the complaints with prejudice?

REASONS FOR DENYING THE PETITION

The Petition misstates and misconceives the issues involved in this action, which are carefully and concisely set forth in the opinion of the District Court approving the settlement of this action. Stated simply, this action was commenced on behalf of all Class B stockholders of Missouri Pacific Railroad Company ("MoPac") to compel the payment of dividends to that class. In 1968 the action

was determined to be a class action pursuant to Fed. R. Civ. P. 23(a), (b)(1) and (2), binding upon all Class B stockholders of MoPac.

In 1972 the parties to the action effected a settlement agreement which includes a plan of recapitalization for MoPac. (R. Doc. 5)* Approved by the MoPac stockholders, the recapitalization will effectively eliminate the cause of dispute which resulted in this suit for dividends, a result which could not have been achieved by litigation. The District Court in approving the settlement found the plan "fair, reasonable and adequate" to the Class B stockholders and to MoPac.

1. Contrary to the petitioner's assertion (Pet., at 6), the recapitalization was not "ordered" by the District Court; rather, MoPac was *permitted* to submit a plan of recapitalization to its stockholders for their vote, which, if approved, would result in a settlement of the litigation. In doing so, MoPac not only adhered to this Court's earlier decision** requiring a separate class vote on major corporate action, but went further and submitted the plan to its stockholders subject to a majority vote of the minority of each class.***

On June 15, 1973, three days after the Court of Appeals had summarily affirmed the judgment of the District Court and refused to stay the MoPac stockholders' meeting, the stockholders of MoPac overwhelmingly approved the plan of recapitalization. MoPac also has applied to the Interstate Commerce Commission for authority to issue the new shares contemplated by the plan, a full and complete hearing was held before the I.C.C. in September of this year, and a decision is now pending.

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* The settlement agreement is also printed as an attachment to the MoPac Proxy Statement, R. Doc. 29. That agreement provides, in paragraph 7.7 thereof, that the agreement may be terminated by any party if the recapitalization is not concluded by December 31, 1973.

** *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967).

*** See Proxy Statement, R. Doc. 29, at p. 2.

Petitioner stands in no different position from any other stockholder who opposes corporate action supported by most of the stockholders. Any injury which he might incur is not the result of any action by the federal courts, but of the process of corporate democracy. Any remedy available to him by way of appraisal or otherwise is not denied to him by the judgment of the court below but arises if at all under Missouri law and should be asserted in the Missouri courts.

2. The judgment of the District Court is binding upon all members of the class, but only to the extent that they are barred from commencing a new action to compel the payment of dividends. Pursuant to the settlement, as approved by the District Court, the complaints in this case were dismissed with prejudice, and that dismissal is binding upon all members of the class. Because any relief which might have been obtained in litigation compelling MoPac to pay additional dividends to the Class B stockholders would necessarily have had to benefit every member of the class, the District Court held in 1968 and reaffirmed in 1973 that this case is a class action on behalf of all Class B stockholders, without a right by any member of the class to seek exclusion.

It is beyond question that an action to compel the payment of dividends is appropriate for class treatment. Indeed, this particular type of suit is specifically mentioned in the Notes of the Advisory Committee on the Federal Rules with respect to amended Rule 23, which states that a stockholder's action to compel declaration of a dividend should ordinarily be conducted as a class action within Rule 23(b)(1). Notes of Advisory Committee on Federal Rules, 28 U.S.C.A., Fed. R. Civ. P. Rules 17 to 23.1, at 297.

This action was also properly determined to be a class suit under Rule 23(b)(2), in that it sought a mandatory injunction governing future dividends in a case where MoPac had "acted or refused to act on grounds generally applicable to the class . . ." and MoPac could not as a matter of corporate law declare dividends on some but not all of its Class B Stock.

The opinion and decision of the District Court was clearly correct, involves no substantial question of federal law and does not in any other respect present a question justifying the granting of the petition by this Court. Accordingly, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

October 26, 1973

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